

NO. PD-1449-16

IN THE TEXAS COURT OF CRIMINAL APPEALS

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DOUGLAS PAUL CARTER V. THE STATE OF TEXAS

On Discretionary Review of Appeal No. 02-16-00191-CR
in the Second Court of Appeals of Texas at Fort Worth

APPELLANT'S BRIEF ON THE MERITS

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IDENTITY OF PARTIES AND COUNSEL

Pursuant to Rule 38.1(a) of the Texas Rules of Appellate Procedure, the following is a list of all trial judges, parties to the trial court's judgment, and respective trial and appellate counsel:

Trial Court Judge

Hon. Wayne Salvant, presiding trial judge
Hon. Louis Sturns, presiding at punishment
Criminal District Court No. Two
Tarrant County, Texas

Parties

The State of Texas (Appellee)

Douglas Paul Carter (Appellant)

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TABLE OF CONTENTS

	<i>page</i>
IDENTITY OF PARTIES AND COUNSEL	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE.....	1
STATEMENT REGARDING ORAL ARGUMENT.....	2
QUESTION PRESENTED FOR REVIEW.....	3
STATEMENT OF FACTS.....	3
SUMMARY OF THE ARGUMENT.....	4
ARGUMENT AND AUTHORITIES.....	5
QUESTION PRESENTED FOR REVIEW ONE (RESTATED)	
The court of appeals erred in holding that the “Comprehensive Rehabilitation” fee and the “Abused Children’s Counseling” fee assessed pursuant to Section 133.102(a)(1) of the Texas Local Government Code were not facially unconstitutional.....	5
A. <i>Facts</i>	5
B. <i>Opinion Below</i>	6
C. <i>Controlling Law</i>	6
D. <i>Remedy</i>	7

E.	<i>Retroactivity</i>	8
F.	<i>Procedural Status of Appellant’s Petition for Discretionary Review</i>	8
G.	<i>Conclusion</i>	9
	PRAYER	9
	CERTIFICATE OF COMPLIANCE.....	10
	CERTIFICATE OF SERVICE.....	11

TABLE OF AUTHORITIES

<i>Cases</i>	<i>page</i>
<i>Carter v. State</i> , 2016 WL7240681 (Tex. App.– Fort Worth, Dec. 15, 2016, pet. granted) (mem. op., not designated for publication)	6
<i>Salinas v. State</i> , 523 S.W.3d 103 (Tex. Crim. App. 2017).....	7, 8, 9
<i>Statutes</i>	
TEX. HEALTH & SAFETY CODE ANN. § 481.115(c).....	2, 3
TEX. LOC. GOV'T CODE ANN. § 133.102(a)(1).....	5

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**TO THE HONORABLE TEXAS COURT OF CRIMINAL
APPEALS:**

Comes now Appellant, Eddie Offiong Ette, by and through his attorney of record, and respectfully presents to this Court his Brief on the Merits in the named Cause, pursuant to the Rules of the Court.

STATEMENT OF THE CASE

On August 7, 2015, Appellant Douglas Paul Carter ("Mr. Carter" or "Appellant") was indicted for the felony offense of possession of a controlled substance of one gram or more but less

than four grams. [C.R. 5]. See [TEX. HEALTH & SAFETY CODE ANN. § 481.115\(c\)](#).¹ On April 26, 27, & 29, 2016, a jury trial was held in Criminal District Court Number Two of Tarrant County, the Honorable Wayne Salvant presiding over trial, with the Honorable Louis Sturns presiding over punishment. [II, III, & IV R.R. *passim*]. The jury found Petitioner guilty as charged in the indictment. [C.R. 135; III R.R. 40]. Punishment was to the trial court, which after finding the habitual offender enhancement paragraph to be true, assessed a sentence of twenty-five (25) years incarceration. [C.R. 138; IV R.R. 38]. A timely Notice of Appeal was filed on April 29, 2016. [C.R. 144].

STATEMENT REGARDING ORAL ARGUMENT

The Court's Order granting Mr. Carter's Petition for Discretionary Review stated that oral argument would not be permitted.

1

Unless otherwise specified, all citations to statutory authority are to the current versions.

QUESTION PRESENTED FOR REVIEW

The court of appeals erred in holding that the “Comprehensive Rehabilitation” fee and the “Abused Children’s Counseling” fee assessed pursuant to Section 133.102(a)(1) of the Texas Local Government Code were not facially unconstitutional.

STATEMENT OF FACTS

On August 7, 2015, Appellant was indicted for the felony offense of possession of a controlled substance of one gram or more but less than four grams. [C.R. 5]. See [TEX. HEALTH & SAFETY CODE ANN. § 481.115\(c\)](#). On April 26, 27, & 29, 2016, a jury trial was held in Criminal District Court Number Two of Tarrant County, the Honorable Wayne Salvant presiding over trial, with the Honorable Louis Sturns presiding over punishment. [II, III, & IV R.R. *passim*]. The jury found Petitioner guilty as charged in the indictment. [C.R. 135; III R.R. 40]. Punishment was to the trial court, which after finding the habitual offender enhancement paragraph to be true, assessed a sentence of twenty-five (25) years incarceration. [C.R. 138; IV R.R. 38]. The judgment in count one included as court costs a “Consolidated Court Cost” in the

amount of \$133. [C.R. 138, 142].

SUMMARY OF THE ARGUMENT

The court of appeals erred when it held that the “Comprehensive Rehabilitation” account and the “Abused Children’s Counseling” account funded by fees assessed pursuant to Section 133.102 of the Local Government Code qualified as an allocations of funds to be expended for legitimate criminal justice purposes and were thus constitutional.

As Appellant had raised his complaint regarding the assessment of these fees by Petition for Discretionary Review which was pending on the date of this Court’s opinion in *Salinas*, this Court should reverse the opinion below and grant Appellant the relief requested as provided for in *Salinas*.

ARGUMENT AND AUTHORITIES

QUESTION PRESENTED FOR REVIEW (RESTATED)

The court of appeals erred in holding that the “Comprehensive Rehabilitation” fee and the “Abused Children’s Counseling” fee assessed pursuant to Section 133.102(a)(1) of the Texas Local Government Code were not facially unconstitutional.

A. *Facts*

The jury found Petitioner guilty of possession of a controlled substance as charged in the indictment. [C.R. 135; III R.R. 40]. The trial court, which after finding the habitual offender enhancement paragraph to be true, assessed a sentence of twenty-five (25) years incarceration. [C.R. 138; IV R.R. 38]. The judgment of conviction included as court costs a “Consolidated Court Cost” in the amount of \$133, as set forth in Section 133.102(a)(1) of the Local Government Code. [C.R. 138, 142]; *see* [TEX. LOC. GOV’T CODE ANN. § 133.102\(a\)\(1\)](#).

On appeal, Mr. Carter challenged *inter alia* the fees assessed pursuant to Section 133.102(a)(1) of the Local Code which were allocated to the “Comprehensive Rehabilitation” fee and the

“Abused Children’s Counseling” fee.

B. *Opinion Below*

The court of appeals held that the statute mandating the “Consolidated Court Cost” was not facially unconstitutional, and cited to its earlier decision in *Ingram* in which the court concluded that (1) the allocation of 5.0034% to “law enforcement officers standards and education,” which is now collected into an account in the general revenue fund; (2) the allocation of 9.8218% to “comprehensive rehabilitation,” which is spent at the direction of an agency in the executive branch; and (3) the allocation of 0.0088% to a fund for “abused children’s counseling” with no statutory direction to which State account the percentage should be directed, are all related to the the administration of the criminal justice system. 2016. [*Carter v. State*](#), 2016 WL7240681 at *3 (Tex. App.–Fort Worth, Dec. 15, 2016, pet. granted) (mem. op., not designated for publication).

C. *Controlling Law*

On March 8, 2017, this Court issued its opinion in *Salinas*, in

which it held that since two of the fourteen accounts listed in the statute were not related to a legitimate criminal justice purpose, they were therefore a tax, rendering Section 133.102 facially unconstitutional. See *Salinas v. State*, 523 S.W.3d 103, 112 (Tex. Crim. App. 2017). This Court recognized that the “Comprehensive Rehabilitation” account and the “Abused Children’s Counseling” account did not qualify as allocations of funds to be expended for legitimate criminal justice purposes. *Id.* These two accounts were specifically challenged by Mr. Carter in his brief on appeal. Thus, as held by this Court, the fees assessed for the benefit of these accounts are actually an unconstitutional tax in violation of the separation of powers. *Id.*

D. *Remedy*

In its *Salinas* opinion, this Court discussed the remedy for unconstitutionally-assessed fees. *Id.* at 111-12. This Court ultimately concluded that the unconstitutional portion of the various fees assessed collectively under Section 133.102 were severable, and that the total fees of \$133 assessed under Section

133.102 would be reduced by the percentage allocated to the two unconstitutional purposes. *Id.* Thus, the total fees assessed pursuant to Section 133.102 would be reduced by 9.8306 percent. *Id.* This Court therefore modified the amount authorized under that section by subtracting \$13.07, leaving a permitted amount of \$119.93 to be assessed as court costs. *Id.*

E. *Retroactivity*

Recognizing *inter alia* the “large administrative burden” such a remedy would place upon “court clerks throughout the state,” this Court held that the remedy it crafted would be applied to any defendant who has raised the appropriate claim in a petition for discretionary review before the date of the *Salinas* opinion. *Id.* at 112-13.

F. *Procedural Status of Appellant’s Petition for Discretionary Review*

Appellant filed his Petition for Discretionary Review on December 22, 2016. In his Petition, Appellant specifically challenged section 133.102(a)(1)’s allocation of 9.8218% to “comprehensive rehabilitation,” which is spent at the direction of

an agency in the executive branch; and the allocation of 0.0088% to a fund for “abused children’s counseling” with no statutory direction to which State account the percentage should be directed. Thus, Appellant’s Petition for Discretionary Review was pending on the date this Court’s *Salinas* opinion was issued, and he had raised the identical arguments presented in *Salinas*.

G. Conclusion

As this Court stated in *Salinas*:

Therefore, we will also apply our constitutional holding in this case to any defendant who has raised the appropriate claim in a petition for discretionary review before the date of this opinion, if that petition is still pending on the date of this opinion and if the claim would otherwise be properly before us on discretionary review.

Salinas, 523 S.W.3d at 113. Based on this Court’s holding in *Salinas*, Mr. Carter is entitled to the same remedy. See *Id.*

PRAYER

For the foregoing reasons, Appellant respectfully requests that this Court sustain the question presented for review and modify the written judgment entered below by deleting the costs

found by this Court to be unconstitutional. Appellant respectfully requests that he be granted any such further relief to which he may show himself justly entitled.

Respectfully submitted,

/s/ Abe Factor

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CERTIFICATE OF COMPLIANCE

I hereby certify that the word count for the portion of this filing covered by Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure is 1,395.

/s/ Abe Factor

Abe Factor

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been furnished to counsel for the Tarrant County District Attorney and the State Prosecuting Attorney listed below pursuant to Rule 9.5(b)(1) of the Texas Rules of Appellate Procedure through the electronic filing manager, as opposing counsel's email address is on file with the electronic filing manager, on this 30th day of November , 2017.

/s/Abe Factor
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